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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HQ RAD

QUESTIONS PRESENTED

(1) Does the complaint allege a claim for relief under 42 U.S.C. Sec. 1983 because the wrongful conduct of the ITT attorneys denied the petitioners their Constitutional right to a meaningful and fair hearing on the loss of their $300,000.00 secured potato crop where the ITT attorneys were allowed to proceed by the trial judge notwithstanding the conflict of interest and the violation of the Wisconsin Supreme Court Rules of Professional Responsibility and ABA Canons of Ethics?

(2) Does the complaint allege a conspiracy or joint action where the judge allowed said ITT attorneys to defend their own work product when he was aware of the conflict of interest and failed to exercise his mandatory duty to remove said attorneys before substantial rights of the petitioners were affected?

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SUMMARY OF PETITION

The COMPLAINT, alleges wrongful conduct of the trial court and ITT and its ATTORNEYS, Whyte & Hirschboeck, (which law firm drafted a 1979 loan security crop agreement and advised Schulist and ITT that it covered future crops, and which law firm also billed Schulist $1000.00 for its services) who appeared for ITT and ADMITTED in its answer that the crop was secured in a 1981 damage suit by Schulist (claiming that ITT left their secured 1980 $300,000.00 potato crop rot and did not sell the same as required by law in the ITT 1980 foreclosure proceeding) and then the ITT attorneys moved for summary judgment on the ground that the security agreement lacked a "legal" description of the real estate and was therefore unenforceable under Wis. Stat. 409.203(1) and consequently ITT was not responsible for the crop loss, WHEREIN the Trial Judge granted the motion notwithstanding the answer and *the conflict of interest of W & H* therein, contrary to the rules of summary judgment and The Wisconsin Supreme Court Rules of Attorneys Professional Responsibility and Canons of Ethics of The American Bar Association, STATES A CLAIM UNDER SEC. 1983 OF THE CIVIL RIGHTS ACT as petitioners were denied their right under the 14th amendment to a fair and meaningful hearing before being deprived of their property.

LIST OF AUTHORITIES CITED

Cases Cited

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SCR 20.34 3

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the decision of U.S. Court of Appeals for the Seventh Circuit, dated May 23, 1984, and the Judgment entered pursuant thereto affirming the dismissal of their complaint for failure to state a claim for relief under 42 U.S.C. Sec. 1983.

UNPUBLISHED OPINION

The decision of the U.S. Court of Appeals was not published and is set forth herein in the Appendix at page 3a. The complaint, as amended, is set forth in the Appendix at page 13a.

JURISDICTION OF THE COURT

This court has jurisdiction pursuant to 42 U.S.C. Sec. 1983, 28 U.S.C. Sec. 1343, and U.S.C. Sec. 1254(1) to review the decision of said U.S. Court of Appeals. This petition was timely filed

APPLICABLE STATUTES

42 U.S.C. Sec. 1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

WISCONSIN STATUTES:

SCR 20.36 (ABA, DR 7-102) Representing a client within the bounds of the law.

(1) In his or her representation of a client, a lawyer may not:

(a) File a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

• • •

(c) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

• • •

SCR 20.34 (ABA, Canon 7 and EC) A lawyer should represent a client zealously within the bounds of the law.

(1) Ethical consideration. (a) The duty of a lawyer, both to his or her client and to the legal system, is to represent his or her client zealously within the bounds of the law, which includes disciplinary responsibility of a lawyer drives from his or her membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

• • •

SCR 20.33 (ABA, DR 6-102) Limiting liability to client.

A lawyer shall not attempt to exonerate himself or herself from or limit his or her liability to a client for malpractice.

SCR 20.25 (ABA, DR 5-102) Withdrawal as counsel when the lawyer becomes a witness.

(1) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or she or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, may not continue representation in the trial, except that the lawyer may continue the representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the firm may testify in the circumstances enumerated in SCR 20.24(2)(a) to (d).

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STATEMENT OF THE CASE

The Court of Appeals Decision and the attached Complaint set forth the conflict of interest of the ITT attorneys defending their work product in the Schulist claim for damages against ITT for failure to sell, and allowing to rot in the ground, their $300,000.00 1980 potato crop. Briefly stated, said attorneys drafted a security agreement and advised both ITT and Schulists that it secured the potato crop, and subsequently avoided liability on the ground that it was unenforceable because of lack of a legal description. The Court of Appeals stated that the conduct of said attorneys was a "mere impropriety" and that "mere knowledge" of said impropriety by said trial judge did not give rise to a section 1983 cause of action.

REASONS FOR GRANTING WRIT OF CERTIORARI

There are special important reasons under Supreme Court Rule 17.1 for the United States Supreme Court to grant certiorari as:

(1) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by approving such a departure by the Wisconsin trial court in allowing the ITT attorneys to defend their own work product in violation of the Rules of Professional Responsibility as promulgated by both the Wisconsin Supreme Court and the American Bar Association in violation of petitioners right of due process to a fair hearing.

(2) The Court of Appeals has decided an important question of Federal Law under Sec. 1983 of the Civil Rights Act which should be settled by the Supreme Court, that is:

1. Is the wrongful conduct of the ITT attorneys a "mere impropriety" which did not deprive the petitioners of their Constitutional right to a "meaningful hearing"?
2. Is the "mere knowledge" by the trial judge of the attorney's conflict of interest over their work product which was the subject of the dispute make him a co-conspirator or joint participant under Sec. 1983?

(3) The Court of Appeals has decided an issue that goes to the heart of our adversary system of justice under the Constitution.

ARGUMENT

Due process does not distinguish between a deprivation of property by an unconstitutional statutory scheme or, an unconstitutional judicially proscribed procedure. *Monroe* v. *Pape* 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961), *Ex parte Virginia* 100 U.S. 339, 346-347, 25 L.Ed. 676 (1980). Where the state abuses its lawful authority, or exceeds lawful authority in the deprivation of property, there is a direct violation of the plaintiffs' Fourteenth Amendment due process rights. *Adickes* v. *S.H. Kress and Company* 90 S.Ct. 1598, 398 U.S. 144 (1970), *Lugar* v. *Edmondson Oil Co., Inc.* 102 S.Ct. 2744 (1982). Recently, in *Pulliam* v. *Allen* 104 S.Ct. 1970 (1984) the Supreme Court granted injunctive relief against a trial judge for imposing bail in violation of the individual's right of due process and equal protection and also awarded attorney fees pursuant to 42 U.S.C. Sec. 1983 and 1988. Unconstitutional practices by trial judges in civil cases also give rise to a claim for damages against the private individuals notwithstanding the judge is immune from such claim under Sec. 1983. *Sparks,* infra.

THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES A "MEANINGFUL HEARING" UTILIZING "FUNDAMENTAL FAIRNESS" BEFORE DEPRIVING A PERSON OF THEIR PROPERTY.

The Court in *Mathews* v. *Eldridge* 96 S. Ct. 893, 902, 424 U.S. 333 (1976) restated the rules applicable to due process determination, to wit:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff* v. *McDonnell*

418 U.S. 439, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e.g. *Phillips* v. *Commissioner of Internal Revenue* 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also *Dent* v. *West Virginia* 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Facist Comm.* v. *McGrath,* 341 U.S. 123, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.: *Armstrong* v. *Manzo* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965). See *Grannis* v. *Ordean* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914).

• • •

These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, circumstances." *Cafeteria Workers* v. *McElroy* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). "Due process is flexible and calls for such procedural protection as the particular situation demands" *Morrissey* v. *Brewer* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

The Trial Court upon the record before it was aware of the ITT attorneys' responsibility, not only to remove themselves from the case, but to explain the admission in the answer. The defendants acted under color of law by proceedings under the summary judgment procedure 802.08 and 409.203 Wis. Stats. and in violation of the rules of professional responsibility knowing it was not a fair hearing.

In *Re Banks* Or 584 P 2d 284, 1 ALR 4th 1105, (1978) the attorney for the corporation drew an employment agreement between it and an officer. Litigation subsequently developed over the meaning and enforcement of the contract. The corporate attorneys were reprimanded for proceedings to represent the corporation in the dispute stating that when (p. 1117) ". . . a conflict arises between the officer and the corporation about the subject of the representation, the attorney is in an untenable position if he represents either one." (further citing):

> . . . Where two individuals for whom he drew a contract or a mortgage get into a dispute over it, he may not represent either. *Drinker,* Legal Ethics 112-13 (1953).

(see also *Florida Bar.* v. *Teitelman* 261 So. 2d 140, 68 ALR 3rd 959 where the lender's attorneys handled the closing; and also, in *Re Young* (1919) 188 App. Div. 338, 177 NYS 259, *where acting as legal adviser to both lender and borrower* in a loan transaction was held to be professional misconduct; see also 17 ALR 3rd 835, Attorneys — Conflicting Interests.) The rule is cognizable in Wisconsin, *City of Whitewater* v. *Baker,* 99 Wis. 2d 449, 299 N.W. 2d 584 (C.A. 1980).

Due process depends on the facts of each case. The courts have often judicially stated that the "touchstone" of due process in any judicial proceeding is the presence of *fundamental fairness* and that the *pretext* of a hearing cannot be used to conceal a denial of due process. *Burgess* v. *Miller* (D.C. Florida 1980) 492 F.Supp. 1284. In *Murphy* v. *Helena Rubinstein Company* 234 F.Supp. 893 (N.J. 1964) the court stated p. 896:

". . . The demands of due process required by the *Fourteenth Amendment* are such as accord traditional concepts of fair play, substantial justice, and a resolution of the controversy on the merits. These are the very pillars of Anglo-Saxon Laws . . ."

In *Ennis* v. *Ennis,* 88 Wis.2d 82, 97, 276 N.W.2d 341 (1978) the court re-affirmed the duty of the trial court to correct the attorneys wrongful conduct stating:

. . . The Wisconsin Supreme Court has held that *trial court have not only the power but the duty to intervene where the professional misconduct* of an attorney [is involved] *sic* before it affects the substantial rights of the parties. In *Harvey* v. *Harvey,* 202 Wis. 553, 561-62, 231 N.W. 580 (1930), the court recognized that the trial court's power to dismiss an action extended to cases involving conflicts of interest, as well as to cases involving champertous contracts. See also *Blixt* v. *Janowiak,* 177 Wis. 175, 188 N.W. 89 (1922). This power was more recently recognized in *Rode* v. *Sealite Insulation Mfg. Corp.,* 3 Wis.2d 286, 88 N.W. 2d 345 (1958), which upheld the trial court's denial of a motion to dismiss only because the offending attorney had withdrawn from the case and new counsel had been substituted.

Standard Seven of the Code of Judicial Ethics, 36 Wis.2d 252, 257, 153 N.W.2d 873 (1967), states that a judge "should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors." In addition, recent federal cases have found an inherent power in courts to enforce the Canons of Ethics by disqualifying attorneys from proceedings with the case in conflict of interest situations. See *Marketti* v. *Fitzsimmons,* 373 F.Supp. 637 (W.D. Wis. 1974); *Koehring Co.* v. *Manitowoc Co., Inc.,* 418 F.Supp. 1133 (E.D. Wis. 1976); *First Wisconsin Mortgage Trust* v. *First Wisconsin Corp.,* 571 F.2d 390 (7th Cir. 1978).

> The interests which warrant and necessitate this power in the trial court are broader than those of the individual litigants. The interests of the public and of the profession are also involved. As counsel for defendant argued before the trial court, this issue goes to "the heart of our attorney system." *Attorneys and judges alike have a responsibility to protect that system from abuse.* (Emphasis added)

United States General, Inc. v. *Schroeder* 400 F.Supp. 713, 718 (E.D. Wis. 1975) recognized that a private attorney could be held liable under section 1983 for improper use of a state judicial form stating:

> . . . In point of fact, it may well be that any intentional and malicious use of a state forum to effect a deprivation of constitutional rights serves to provide a cause of action for the injured party under the provisions of 42 U.S.C. Sec. 1983. See: *Brown* v. *Dunne,* 409 F.2d 341, 344 (7th Cir. 1969), Kerner, J. concurring. This Court does not reach that question here, however.

The attorney for Schroeder proceeded with garnishments, knowing they were invalid. Here, the lender and its attorneys, Whyte and Hirschboeck, proceeded with summary judgment, knowing full and well that such procedure violated the rules of fair play and denied the plaintiffs a fair hearing on the merits.

In *Dennis* v. *Sparks* 101 S.Ct. 183 (1980), defendants obtained an illegal injunction enjoining production under certain oil leases owned by plaintiffs. The complaint was sufficient because it alleged a "corrupt conspiracy" — payoffs to the judge. Petitioners submit that they need only alleged a "civil conspiracy", and have so alleged, to state a Sec. 1983 claim.

SECTION 1983 CONSPIRACY

A civil conspiracy is described under the common law as "a combination of two or more persons to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." Unlawful is defined in such definition as not to be confined to criminal acts, but also includes all "willful, actionable violations of civil rights." *Mendelson* v. *Blatz Brewing Co.* (1960), 9 Wis. (2d) 487,490,101 N.W. (2d) 805. Under this definition of conspiracy mere knowledge is sufficient to make a judge a co-conspirator where he knowingly proceeds to deny the petitioners due process and equal protection of the laws. 15A C.J.S., Conspiracy, Sec. 2, p. 601-02.

Plaintiffs have alleged that the defendants acted jointly with the circuit court because of an abuse of the summary judgment procedure by the court (allowing the lender's attorney to participate, failure to hold a meaningful hearing, and deciding a disputed factual issue without an evidentiary hearing or trial). The operative facts alleged in the complaint show a conspiracy or joint activity with the court to deprive the plaintiffs of their property without due process of law.

CONCLUSION

The unlawful interference of the ITT attorneys substantially affected the rights of the petitioners under our adversary system to deny them a meaningful hearing. Under the circumstances of this case the complaint has alleged a Sec. 1983 cause of action and this court should grant a writ of certiorari to the Seventh Circuit Court of Appeals for the reasons above stated.

Dated this 10th day of August, 1984.

Respectfully submitted,

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

VS.

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3a Court of Appeals decision of 5/23/84

13a Petitioners' District Court Complaint

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 10, 1984*

May 23, 1984

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

No. 83-1675

SCHULIST FARMS, INC., et al.,

Plaintiffs-Appellants,

vs.

ITT CONSUMER FINANCIAL CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 C 68

JOHN C. SHABAZ, *Judge*.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See Rule* 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

The plaintiffs in this case, the Schulists,[1] filed suit against the defendants[2] alleging that the defendants, acting under color of state law, deprived the plaintiffs of their property without due process of law. The complaint was filed pursuant to 42 U.S.C. § 1983 and subject matter jurisdiction was asserted under 28 U.S.C. § 1343. The complaint also asserted two pendent state claims charging that the defendants committed fraud in procurring a state court judgment against the Schulists, and that the defendants' conduct in that suit was an abuse of process. The district court dismissed the complaint for failure to state a claim under 42 U.S.C. § 1983 for lack of any state action. The Schulists appeal the dismissal of the complaint.

I.

In order to understand the Schulists theory of the case, a brief recitation of the history of the relationship between plaintiffs and defendants is necessary. The defendant, Thorp Finance Corporation (an adopted name for Aetna Finance Company, which in turn is a subsidiary of defendant, International Telephone and Telegraph Consumer Financial Corporation), loaned the plaintiff 250,000 dollars. The loan was secured both by a real estate mortgage and by a personal property security agreement. The Schulists did not retain their own attorney, but rather used the same firm as Thorp, the defendants, Whyte and Hirschboeck. Attorney Heiser, a member of the firm, performed the legal services on behalf of the firm. The firm billed the Schulists directly

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[1] The seven plaintiffs will collectively be referred to as the Schulists.

[2] The named defendants are the financial institutions that funded a loan to the Schulists and the attorneys who represented both the institutions and the Schulists.

for its services. In a letter to the Schulists, the firm indicated that there was a "blanket security agreement" and both Thorp and the plaintiffs assumed and acted as if the agreement covered the growing potato crops on the land.

Apparently, the Schulists were unable to meet the loan payments and, in February 1980, Thorp initiated foreclosure proceedings against the Schulists. The Schulists, meanwhile, planted a potato crop on the land in the spring of 1980. Pursuant to a foreclosure judgment, a personal property auction and a Sheriff's sale were held. Thorp purchased the land at the Sheriff's sale, but did not sell the potato crop. The crop rotted in the field. The Schulists challenged the foreclosure proceeding on appeal and the judgment was reversed.

The Schulists filed suit in state court against Thorp requesting damages for the loss of the potato crop. The damages suit was consolidated with the remanded foreclosure action. In this action, Thorp continued to be represented by the defendant firm, Whyte and Hirschboeck. Thorp, in its answer, admitted that they had a security interest in the growing crops. Thereafter, however, Thorp moved for summary judgment arguing that the security agreement did not cover the growing crops, due to a lack of proper legal description in the loan documents. Plaintiffs filed a motion opposing summary judgment, along with counter-affidavits, and deposition testimony by Thorp officials contradicting Thorp's motion for summary judgment.

The state court granted summary judgment to Thorp. The Schulists contend that the state court judge granted the defendants' motion for summary judgment despite the fact that the Schulists had submitted counter-affidavits, and despite the allegedly clear conflict of interest on the part of Whyte and Hirshboeck reflected in the record.

The record in this court is not clear as to whether plaintiff's appealed from the grant of summary judgment. The plaintiffs, subsequent to the grant of summary judgment, commenced suit in federal district court charging defendants with fraud, abuse of process and with the violation of plaintiffs' constitutional rights. The district court dismissed the suit for failure to state a claim for which relief could be granted pursuant to 42 U.S.C. § 1983. Plaintiffs appeal.

II.

The sole issue to be determined on appeal is whether the third count of plaintiffs' second amended complaint states a claim for which relief can be granted pursuant to 42 U.S.C. § 1983.[3] The third count is plaintiffs' only

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[3] Count III of the second amended complaint reasserts the fraud and abuse of process allegations and adds the following paragraphs:

> 27. Realleges paragraphs 1-25 above. That the above defendants jointly and separately, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983, for which they are entitled to recover compensatory and punitive damages as demanded herein.
>
> 28. That the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the plaintiffs of their property without due process of law. That the circuit court of Portage County, Wisconsin, upon the record and information before it, willfully entered summary judgment pursuant to an unconstitutional procedure, under color of state law, depriving plaintiffs of their property ($240,000 potato crop) without due process of law in that among other conduct, the court (1) exceeded or abused its authority by utilizing the summary judgment procedure where a disputed issue of fact existed,

asserted federal cause of action, the other two counts being state tort actions. Without commenting on the merits of plaintiffs' first two counts, the state tort actions, we note that plaintiff must state a federal cause of action in order to remain in federal court. The federal court lacks jurisdiction over the state court claims standing alone.

In reviewing the grant of a motion to dismiss, this court must take all well-pleaded factual allegations as true. *Reichenberger* v. *Pritchard,* 660 F.2d 280 (7th Cir. 1981); *Brucar* v. *Rubin,* 638 F.2d 987 (7th Cir. 1980). Taking plaintiffs' factual allegations as true, we must affirm the granting of a motion to dismiss only if it is clear that the plaintiff can prove no set of facts entitling him to relief. *Corley* v. *Gibson,* 355 U.S. 41 (1957); *Reichenberger* v. *Pritchard,* 660 F.2d at 282.

In determining whether plaintiffs can prove any set of facts entitling them to relief, we must analyze the elements of a § 1983 cause of action, for even if plaintiffs can prove all the allegations in their complaint they still might not prove a § 1983 violation. In order to recover under § 1983 a plaintiff must demonstrate that actions of the defendants have deprived plaintiffs of a right secured by the constitution or laws of the United States and that the defendants did so acting under color of state law. *Flagg Brothers, Inc.* v. *Brooks,* 436 U.S. 149 (1978).

Plaintiffs complain of a deprivation of their property without due process of law in violation of the Fourteenth

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[3] (Continued)

(2) allowed the lender's attorney, as drafter of the disputed document, to file an answer admitting plaintiffs' claim, but nevertheless, proceeding on said attorney's legal memorandum and conflict of interest therein, so as the deny plaintiffs a meaningful hearing, and (3) denied plaintiffs their right to a jury trial.

Amendment. The Fourteenth Amendment is only violated by action that can be characterized as state action. Although the "state action" requirement and "under color of state law" requirement are separate inquiries in a determination of whether a given complaint states a cause of action under 42 U.S.C. § 1983, it is clear that under the constitutional violation asserted by plaintiffs in the instant case, the Fourteenth Amendment "state action" requirement and the "under color of state law" requirement are idential. *Lugar* v. *Edmonson Oil Co., Inc.,* 102 S. Ct. 2744, 2753 (1982). The question presented, therefore, is whether any actions of the defendants can be considered "state action"[4] for the purpose of supporting a § 1983 claim.

To support a finding of "state action" the conduct allegedly causing the constitutional deprivation must be "fairly attributable" to the state. The determination of whether certain conduct is "fairly attributable" to the state requires a two-step analysis. The deprivation, of which a plaintiff complains, "must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible." *Lugar,* 102 S. Ct. at 2754. The second step requires that the

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[4] The Supreme Court, in *Lugar,* noted that if the challenged activity constitutes state action the conduct also satisfies the "under color of state law" requirement. "Under color of state law" requires a separate inquiry in circumstances where the constitutional violation of which a party complains does not contain a "state action" requirement. *Lugar,* 102 S. Ct. at 2753 n.18. We need only limit our inquiry to whether the conduct challenged in the instant case constituted "state action." If we find, as we do, that it is not state action, the first element of a § 1983 cause of action is not satisfied and plaintiffs' complaint would not state a claim for which relief could be granted.

> party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. at 2754. We must look to the complaint to determine whether defendants' actions satisfy these two tests.

The deprivation of property in this case, the loss of the potato crop, was caused by an entry of summary judgment against plaintiffs. Summary judgment was entered against plaintiffs by a state court judge. This, in plaintiffs' theory of the case, is the state action. Assuming, for the sake of discussion, that this deprivation was "caused by the exercise of some right or privilege created by the state,"[5] we must determine whether the defendants, who are private parties, can be characterized as state actors. Private parties jointly acting with state officials in prohibited activity can be characterized as state actors. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). The complaint in the instant case alleges that the defendants willfully acted jointly with the state court to deprive plaintiffs of their property. In their appellate brief, plaintiffs assert that this is an allegation of conspiracy. A close reading of the brief complaint, however, leads to a contrary conclusion. The plaintiffs complain that the judge exceeded his authority by granting summary judgment despite the fact that a disputed issue of material fact existed. This allegation amounts to no more than a claim of error or irregu-

---

[5] We do not find that imposition of summary judgment after notice and hearing constitutes a constitutional deprivation, in this case deprivation without due process of law. Generally, the cases wherein a constitutional deprivation is found have been prejudgment, *ex parte* attachment of property. In the instant case, the plaintiffs are challenging a taking of property after notice and hearing. See text p. 10, *infra*.

larity in a state court proceeding. This allegation is not cognizable in a § 1983 claim. *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969). Under the circumstances of this case, the federal court does not provide a forum for review of state court trial errors.

Plaintiffs' next asserts that joint participation by the court and defendants was demonstrated when the state court allowed the defendant attorneys to represent the credit companies despite the clear conflict of interest, thereby denying plaintiffs a fair hearing. The entry of judgment by the state court judge despite the fact that he was aware that a conflict of interest existed, amounts again to a claim of error or irregularity in the state court proceedings. Mere knowledge does not convert the state court judge into a conspirator. There is no allegation here of bribery or other activity indicating that there was an agreement between the state court judge and the defendants herein to procure this particular judgment. *Cf. Dennis* v. *Sparks,* 449 U.S. 24 (1980). Instead, the complaint describes a situation where the defendants herein, allegedly acting improperly, resorted to the courts and were successful even though the court knew of the impropriety. There is no allegation of conspiratorial conduct between the judge and the defendants. The complaint fails to allege sufficiently joint action on the part of the judge and the defendants to state a claim under § 1983.

Plaintiffs lastly contend that the defendants and the judge acted jointly in depriving the plaintiffs of a jury trial. The state court judge granted summary judgment in favor of the defendants. The grant of a motion for summary judgment where there is no genuine issue of material fact is not a violation of the right to a jury trial. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2714 (1983); *Shore* v. *Parklane Hosiery Co., Inc.,* 565 F.2d 815 (2d Cir. 1977),*aff'd* 439 U.S. 322; *Oglesby* v. *Terminal Transport Co., Inc.,* 543 F.2d 1111, 1113 (5th Cir. 1977); *United States* v. *Stangland,* 242

F.2d 843 (7th Cir. 1957). The complaint does not allege joint action by the judge and the defendants to obtain judgment against the plaintiffs. In short, the complaint falls far short of alleging any facts that specifically support a conspiracy. The complaint itself alleges joint action, but describes improper action by the attorneys and separate erroneous action by the judge. The complaint states only conclusory and vague allegations of conspiracy and, as such, fails to state a claim of conspiracy. *See Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975). Without any type of joint action or conspiracy with the state court judge, the defendants cannot fairly be said to be state actors.

A private attorney representing private litigants in a state court action does not act "under color of law" *Hansen* v. *Ahlgrimm*, 520 F.2d at 770; and, therefore the attorney cannot be said to be a state actor. *See also Lindley* v. *Amoco Production Co.*, 639 F.2d 671 (10th Cir. 1981). The attorneys in the instant case, even assuming they acted tortiously and in violation of their professional responsibilities, are not state actors.[6]

There remains one other method by which the private litigants may become state actors for the purpose of stating a claim pursuant to § 1983. Where a litigant invokes a state procedure which itself is challenged as unconstitutional, a litigant may be found to be acting under color of state law for purposes of finding the required state action in a Fourteenth Amendment claim. *Lugar* v.

---

[6] We do not imply by this decision that we condone the defendants actions in this case, if the allegations are indeed true. We merely find that the complaint fails to state a claim under § 1983; therefore we have no jurisdiction to consider plaintiffs' other claims.

Edmondson Oil Company, Inc., 102 S. Ct. at 2756.[7] Plaintiffs allege that the statute itself was unconstitutional yet provide nothing in support of that allegation. The complaint itself does not allege that the summary judgment procedure itself is unconstitutional. The complaint alleges no more than a misuse or abuse of the statute, and, as such, fails to state a cognizable § 1983 claim. *Lugar*, 102 S. Ct. at 2757.

III.

Plaintiffs' complaint fails to state a claim for which relief can be granted pursuant to 42 U.S.C. § 1983. The conclusory allegations of joint action with the state court judge and the conclusory constitutional challenge to the state summary judgment procedure fail to convince us that plaintiffs' complaint falls within the ambit of a § 1983 claim. The district court's dismissal of plaintiffs' complaint is affirmed.

---

[7] The *Lugar* case involved an attack on the constitutionality of *ex parte*, prejudgment attachment procedure. The Supreme Court found state action had been sufficiently pleaded, under the specific circumstances of the case, where the plaintiffs challenged the invocation by defendants of an unconstitutional statute. The courts have strictly scrutinized these *ex parte*, prejudgment attachment procedures because of the serious due process implications. *See Mitchell* v. *W.T. Grant*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance*, 395 U.S. 337 (1969). No such *ex parte* action was taken here and there is no allegation that the procedures used deprived plaintiffs' of notice and opportunity to respond.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Plaintiffs,

-vs-

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Defendants.

Case No. 83-C-685

AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL

COMPLAINT FOR DAMAGES

Plaintiffs for their claim for relief against defendants state:

THIS COURT HAS JURISDICTION OVER THE CAUSES OF ACTION ALLEGED HEREIN PURSUANT TO 28 USCA Sec. 1331, 1332, and 1343.

1. The plaintiff, Schulist Farms, Inc., is a Wisconsin corporation with a principal place of business at Route 1, Custer, Wisconsin, and was formally engaged in the business of operating a dairy and potato farm in Portage County, which had been in the Schulist family for over 100 years.

2. That the plaintiff, Schulist Enterprises, is a partnership with a principal place of business at Route 1, Custer, Portage County, Wisconsin, and was engaged in the business of wholesaling potatos.

3. That the plaintiff, Thomas H. Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin and is by occupation a farmer; that the plaintiff, Rosalie Schulist, is a wife of Thomas H. Schulist and resides at Route 1, Custer, Portage County, Wisconsin and is by occupation a farm wife.

4. That the plaintiff, David A. Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin and is by occupation a farmer; that the plaintiff, Muriel Schulist, is an adult residing at Route 1, Custer, Portage County, Wisconsin, and is the wife of David A. Schulist, and is by occupation a farm housewife.

5. That the plaintiff, Paul F. Schulist, is an adult residing at Route 1, Custer, Wisconsin, and is by occupation a dairy and potato farmer.

DEFENDANTS

6. ITT Consumer Financial Corporation (ITTCFC), a division of Internation Telephone and Telegraph, a Delaware corporation, has its headquarters at the Shelard office building complex located at 300 South County Line Road 18, Minneapolis, Minnesota, whose business consists, of financial management including providing services to Aetna Finance.

7. Aetna Finance Company (Aetna), a Delaware corporation, is engaged in consumer and business financing, at 300 South County Line Road 18, Minneapolis, Minnesota and is licensed to transaction business in the State of Wisconsin, and is also a subsidiary of ITT Financial Services, under the adopted name of Thorp Finance Corporation, which has loan offices in Wisconsin, including an office at Stevens Point, Wisconsin.

8. Whyte and Hirschboeck, S.C., is a professional service corporation of Wisconsin attorneys of which Edward J. Heiser, Jr. is a member attorney with offices at 2100 Marine Plaza, Milwaukee, Wisconsin; that at all time ma-

terial hereto said defendant attorneys were counsel for the above named other defendants as hereinafter alleged:

FIRST CAUSE OF ACTION

(Fraud in the Procurement of Obtaining Order and Judgment Dismissing Plaintiffs' Complaint for Loss of $300,000 1980 Potato Crop.)

9. In 1980 Thorp foreclosed its real estate mortgage and personal property security against Schulists. (Case No. 80-CV-69, Cir.Ct.Portage County, Wisconsin) Pursuant to said foreclosure proceedings, Thorp sold the Schulists' personal property at auction on 10/10/80 and the secured real estate at sheriff's sale on 10/13/80, at which sale Thorp purchased the real estate on which was growing the plaintiffs' matured 100 acre potato crop. Said sale was confirmed on 10/31/80 and a deed delivered to Thorp for said property. Thorp did not disclose to the court the fact that a potato crop was growing on said property or account for its value in its bid price. The potato crop rotted in the ground at a net loss to Schulists of $240,000. On October 27, 1981, the Wisconsin Court of Appeals reversed and remanded the confirmation of 10/31/80 pursuant to which the trial court by order dated 12/14/81 vacated the sale to Thorp and consolidated the foreclosure action with plaintiffs' pending action for damages initiated in April 1981 — Case No. 81-CV-141 against defendants ITTCFC and Aetna (Thorp).

10. On July 27, 1981, plaintiffs filed an Amended Complaint in 81-CV-141, Circuit Court, Portage County, Wisconsin alleging seven (7) causes of action against the defendants, ITT, Aetna (Thorp) therein, relating to the improper foreclosure and sale of their farm and secured personal property including the loss of their $300,000 secured 1980 potato crop.

11. Paragraph 20 of said Amended Complaint reads as follows:

> On June 12, 1979, Thorp Finance Corporation of Stevens Point, Wisconsin, a subsidiary of ITT Financial Services, utilizing the tradename, Thorp, loaned $250,000 to Schulist Farms, Inc., which was co-signed by the other named plaintiffs herein. *The note was secured by* personal farm machinery, cattle, *growing crops,* irrigation and potato farm harvesting equipment, as well as a first mortgage on a 118 acre potato farm with irrigation systems (known as the Almond farm) and a second mortgage on approximately 545 acres of other farm land and buildings, including the home farm on which there are the separate residences of the plaintiff and the parents of David, Thomas and Paul Schulist. (Emphasis added)

12.. Pursuant to a partial settlement, four (4) causes of action were dismissed, and the court entered an order dated 12/14/81 dismissing the defendants' motion to dismiss, directing plaintiffs to file a clarifying second amended complaint realleging the remaining three (3) causes of action, and further directing the defendants to answer.

13. Paragraph 9 of the plaintiffs' Second Complaint reads:

> On June 12, 1979, Thorp Finance Corporation of Stevens Point, Wisconsin, a subsidiary of ITT Financial Services, utilizing the tradename Thorp, loaned $250,000 to Schulist Farms, Inc. which was co-signed by the other named plaintiffs herein. *The note was secured by* personal farm machinery, cattle, *growing crops,* irrigation and potato harvesting equipment, as well as a first mortgage on parcel 1 and a second mortgage on parcel 2, as described in the judgment of 5/30/80, hereinafter described. (Emphasis added)

14. On 1/4/82 the defendants, by their attorneys, Whyte and Hirschboeck, S.C., per Edward J. Heiser, answered

said complaint, inter alia, *admitting* the allegations of said paragraph 9.

15. Notwithstanding said admission of a security on the growing crops Thorp filed a motion on February 4, 1982 for summary judgment based upon "the second amended complaint and other files of this case," *and upon the legal memorandum prepared by Whyte and Hirschboeck,* to dismiss the claim of said complaint which in any way involves responsibility (of Thorp) for the crops planted by plaintiff in the spring of 1980. The basis of said motion was that the security agreement lacked a real estate description and Thorp had no enforceable security under Wis. Stat. 409.203(1).

16. Thereafter the plaintiffs filed counter-affidavits alleging that both parties, Schulists and Thorp, intended that the note and security instruments relating to the loan of June 12, 1979 granted Thorp a security on the crops, and that the security agreement (while not in the body of the instrument) had a legal description attached because of its length; in addition the note on its face specifically shows crops as security, and the security agreement itself has farm products checked as security which under Wisconsin Stat. 409.109(3) includes crops or products of crops.

17. That Verlyn Schultz, the Thorp manager who was acquainted and serviced the Schulists loan from its inception, testified under oath on 6/11/81 that a legal description was attached to the security agreement stating:

> p. 47 (referring to the security agreement)
>
> Q. And below typed in detail of the property that is secured, there is a printed portion of the security agreement which reads: "including all increases thereof and all property thereto, and all substitutions and replacements and proceeds thereof, together with all of the interest of the undersigned and all farm supplies and all crops of every kind growing

or to be grown or harvested on the land described below, and in any and all products of crops and livestock in any period," is that right?

A. YES

Q. Now, attached to that security agreement was not only an itemization of particular pieces of property such as irrigation equipment, farm machinery, but also is a description of the real estate?

A. YES

Then at p. 98:

Q. I believe, Mr. Schultz, I earlier inquired as to the real estate description which was attached to the security agreement being designated a schedule "AA"?

A. YES

That in addition, said Thorp loan cards (all eight of them) covering the Schulists loan had separately typed thereon that the loan was secured by crops.

18. That notwithstanding the above, said defendants arranged for the filing of an affidavit by Verlyn Schultz dated March 1982 in which he denied that the real estate description was attached to the security agreement or that Thorp intended to take a security in the growing crops.

19. That pursuant to a letter dated June 1, 1979, attached Exhibit A, Whyte and Hirschboeck, S.C. and Edward J. Heiser, Jr., drafted the loan closing documents and attended the loan closing on June 12, 1979 giving advice to both Thorp and Schulists regarding the legal effect of said closing documents. That Schulists relied on the representations and advice given at said loan closing and thereafter, that their 1980 potato crop was secured by Thorp.

20. That Schulists were not represented, or were advised to have separate counsel, at said closing, BUT IN FACT, Whyte and Hirschboeck, S.C., billed Schulists $1,000.00 (which they paid) per the attached Exhibit B.

That on June 22, 1979, Whyte and Hirschboeck advised Thorp by letter that it had a "blanket security" agreement covering Schulists.

21. Notwithstanding that the defendants knew or had reason to know that the intent was to secure the growing crops, said defendants, upon information and belief, concealed their errors (negligence) relating to the drafting of said documents, and to save themselves harmless from liability, did cause deceptive and false documents to be filed with the court included the Schultz affidavit of March 1982, and the self-serving legal memorandum filed by Whyte and Hirschboeck on behalf of said defendants.

22. That said attorneys Whyte and Hirschboeck and Edward J. Heiser, Jr. have appeared and defended said crop issue in the Portage County Circuit Court and the Wisconsin Court of Appeals, when they knew or had reason to know that said representation was illegal and improper by reason of their having acted in a dual capacity giving advice to both Schulists and Thorp and drafter of the loan closing documents. That thier participation, upon information and belief, was done to cover up and conceal and to save themselves and their clients from liability for the loss of the $300,000 1980 potato crop, and tainted the entire proceeding with fraud, particularly where Whyte and Hirschboeck drafted the loan documents, drafted the answer admitting the security on growing crops, and then failed to file an affidavit by Edward J. Heiser, the drafter of the instrument denying the Schulists claim of coverage.

23. The defendants knew or should have known that said conduct was reprehensible to the legal rights of the plaintiffs in that they had knowledge that Thorp and Schultz at the confirmation hearing, had failed to report to the court a $140,000 offer on real estate which Thorp purchased at sheriff's sale for $129,000, failed to report $2,066.26 in milk check assignments received by Thorp

on the Schulists account, failed to report proper interest and insurance credit, and failed to report or account for missing personal property sale proceeds, including five (5) missing cows, all of which casts suspicion and untrustworthiness on the Schultz affidavit and the conduct of the defendants relating thereto.

24. That the above conduct has caused Schulists substantial legal fees and expense, interest and expenses exceeding $15,000, the net loss of the $240,000 due them for the 1980 potato crop by virtue of the trial court having granted Thorp's motion for summary judgment dismissing the plaintiffs' claim for the loss of the 1980 potato crop because the legal description was omitted.

25. The acts above alleged on the part of the defendants were done intentionally, wantonly, and/or in reckless disregard of the plaintiffs' rights and to illegally deprive them of their property or the value thereof entitling them to punitive damages in the amount of $5,000,000.

SECOND CAUSE OF ACTION

ABUSE OF PROCESS

26. Realleges paragraphs 1-25 above and state that said conduct constitutes a cause of action directly or alternatively in abuse of process against said defendants.

THIRD CAUSE OF ACTION

VIOLATION OF CIVIL RIGHTS

27. Realleges paragraphs 1-25 above. That the above defendants jointly and separately, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983, for which they are entitled to recover compensatory and punitive damages as demanded herein.

WHEREFORE plaintiffs demand judgment against the defendants jointly and separately in the amount of $300,000 actual damages, $5,000,000 punitive damages, together with interest, costs and attorney fees of this action.

Dated this 14th day of February, 1983.

PLAINTIFFS DEMAND JURY TRIAL.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Plaintiffs,

vs.

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Defendants.

PLAINTIFFS' MOTION TO AMEND COMPLAINT

Case No. 83-C-68-S

Plaintiffs move to amend the third cause of action of their Amended Complaint by adding the following paragraph 28.

28. That the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the plaintiffs of their property without due process of law. That the Circuit Court of Portage County, Wisconsin, upon the record and information before it, willfully entered summary judgment pursuant to an unconstitutional procedure, under color of state law, depriving plaintiffs of their property ($240,000 potato crop) without due process of law in that among other conduct, the court (1) exceeded or abused its authority by utilizing the summary judgment procedure where a disputed issue of fact existed, (2) allowed the lender's attorney, as drafter of the disputed document to file an answer admitting plaintiffs' claim, but

nevertheless, proceeding on said attorney's legal memorandum and conflict of interest therein, so as to deny plaintiffs a meaningful hearing, and (3) denied plaintiffs their right to a jury trial.

Dated this 21st day of March, 1983.

/s/ LARRY W. RADER
Attorney for Plaintiffs

Office-Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-281

In the Supreme Court of the United States

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATON, AETNA FINANCE COMPANY (THORP FINANCE CORPORATION), WHYTE & HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals correctly decided that the plaintiffs' second amended complaint did not state a claim for relief under 42 U.S.C. §1983 because it failed to allege any conduct that could be characterized as "state action" or which occurred "under color of state law"?

STATEMENT REQUIRED BY RULE 28.1

Respondent Whyte & Hirschboeck, S.C., is a service corporation incorporated under Wisconsin law. It has no parent, subsidiary, or affiliate companies.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-281

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

Petitioners,

VS.

ITT CONSUMER FINANCE CORPORATON, AETNA FINANCE COMPANY (THORP FINANCE CORPORATION), WHYTE & HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

The Proceedings Below

This action was originally brought in the Western District of Wisconsin as a diversity action for fraud and abuse of process. That complaint was dismissed for lack of jurisdiction because the Schulists[1] are all residents of Wisconsin and two of the defendants-respondents, Whyte & Hirschboeck, S.C. (hereafter "W&H") and Edward J. Heiser, Jr. (hereinafter "Heiser"), are also Wisconsin residents.

[1] In this brief, all seven of the plaintiffs-petitioners will be referred to collectively as "the Schulists."

The Schulists then filed an amended complaint in which they attempted to establish jurisdiction by asserting a federal claim. To that end they added a one paragraph "Third Cause of Action" to their original complaint. The new paragraph simply incorporated the allegations of the two original claims, and made the conclusory allegation that the defendants "jointly and severally, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983."

The district court granted defendants' motions to dismiss the amended complaint for lack of subject matter jurisdiction. The Schulists requested a reconsideration of that dismissal and the court granted a hearing. Just prior to the hearing, the Schulists sought leave to amend their complaint a second time, to add, as paragraph 28 of their Third Claim for Relief, an allegation that the defendants "willfully acted jointly" with the Circuit Court for Portage County (the Wisconsin trial court) to deprive the Schulists of their property without due process of law. The alleged due process violation was that the defendants had obtained summary judgment against the Schulists in the Circuit Court for Portage County.

Following a hearing, the district court vacated its earlier judgment dismissing the amended complaint, allowed the Schulists to amend their complaint a second time, and then granted the defendants' motions to dismiss the second amended complaint for failure to state a claim and lack of subject matter jurisdiction.

The Schulists appealed the decision of the district court to the Seventh Circuit Court of Appeals. In an unpublished decision dated May 23, 1984, the Seventh Circuit affirmed the district court's dismissal of the action (Pet. Br., pp. 2a-11a).

Facts[2]

In June of 1979, Aetna Finance Company (d/b/a Thorp Finance Corporation) (hereinafter "Thorp") loaned $250,000.00 to the Schulists. The loan was secured by mortgages on two parcels of land and certain personal property. W&H and Heiser drafted the loan documents and represented Thorp at the closing. When the loan was not paid, Thorp sued to foreclose its mortgages. Pursuant to those foreclosure proceedings, the Schulists' personal property and real estate was sold in October of 1980. At the time of the real estate foreclosure sale the Schulists had not harvested a portion of their potato crop, which rotted in the field.

The Schulists appealed the foreclosure judgment to the Wisconsin Court of Appeals, which reversed the confirmation of sale. While that appeal was pending, the Schulists brought a separate state court action against ITT Consumer Financial Corporation and Thorp for improperly foreclosing and selling the farm and personal property, and for loss of the 1980 potato crop. That action for damages was consolidated with the remanded foreclosure action in the Circuit Court for Portage County.

The parties settled some of the claims pending in the consolidated case. Thorp moved for summary judgment on the Schulists' remaining claims, and the trial court

---

[2] Since this is a review of a decision granting a motion to dismiss, the "facts" which are deemed to exist are those well pleaded factual allegations in the Schulists' Second Amended Complaint. W&H and Heiser dispute many of the so-called "facts" alleged by the Schulists. However, for purposes of this petition, those factual allegations control, and are assumed.

granted that motion. The Schulists appealed that summary judgment to the Wisconsin Court of Appeals which affirmed the trial court's grant of summary judgment to Thorp, *Schulist Farms, Inc., et al.* v. *ITT Consumer Financial Corp.*, 115 Wis. 2d 695, 339 N.W.2d 366 (Wis. App. 1983); petition for review denied, 115 Wis. 2d 705 (1983). On January 25, 1983, while that appeal was still pending in the state appellate court, the Schulists brought this action in federal court to, in effect, challenge the state court's grant of summary judgment.

In their federal action the Schulists alleged that their state court complaint for damages recited that the loan from Thorp was secured by growing crops, that W&H and Heiser, acting as Thorp's attorneys, admitted that the loan was so secured in their state court answer, but that Thorp nonetheless moved for summary judgment on the grounds that the loan was not secured by growing crops. That motion was supported by an affidavit from Thorp's local manager denying that the loan was secured by growing crops. The Schulists allege that this affidavit contradicted the manager's earlier deposition testimony. The Schulists filed counter-affidavits opposing the summary judgment motion. The state circuit court judge granted the motion.

The Schulists' federal court complaint contends that the alleged change of position in denying that the loan was secured by growing crops, and W&H and Heiser's alleged conflict of interest as attorneys (the Schulists' claim they gave legal advice to both sides at the loan closing in 1979) constituted fraud (first cause of action), abuse of process (second cause of action) and a violation of the constitution or the laws of the United States (third cause of action).

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because this case does not present any of the considerations which would lead this Court to grant discretionary review. The rulings by the District Court and the Court of Appeals dismissing the Schulists' claim for lack of federal jurisdiction are correct, are not in conflict with the decisions of any circuit court of appeals, and do not depart from the usual course of judicial proceedings so as to require supervision by this Court. The case presents no important question of federal law which has not, but should be, settled by this Court, nor does the decision of the Court of Appeals conflict with the decisions of this Court.

The case involves nothing more than state-law tort claims which the Schulists tried to bootstrap into a federal claim after learning that their claimed diversity jurisdiction did not exist. As the Court of Appeals ruled, the Schulists have stated no claim for relief under 42 U.S.C. §1983. At most, they claim error by the state court, a claim which they could, and did, pursue in the state appellate system.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS WAS CLEARLY CORRECT

The issue in this case is whether the Schulists' complaint, amended twice after they discovered they could not claim diversity jurisdiction, states a claim for relief under §1983 so as to confer jurisdiction on the federal court. The Seventh Circuit correctly decided it did not.

To state a claim under §1983 a complaint must allege facts that show both:

1. That defendants have deprived plaintiffs of a right, privilege, or immunity secured by the constitution or laws of the United States; and

2. That defendants acted under color of state law or authority.

Flagg Brothers, Inc. v. *Brooks,* 436 U.S. 149, 155 (1978). The Schulists complain that the defendants deprived them of their property without due process of law in violation of the Fourteenth Amendment. The Fourteenth Amendment is only violated by "state action." In this instance the requirement of "state action" needed to establish a violation of plaintiffs' constitutional rights and the requirement that the defendants acted "under color of state law" are identical. *Lugar* v. *Edmonson Oil Co., Inc.,* 457 U.S. 922, 935 (1982).

The acts of a private party (such as defendants herein) can only be considered "state action" (or action "under color of state law") if two conditions are satisfied. First, the complained of constitutional injury to the plaintiffs must be caused by the exercise of some right or privilege

created by the state or by a rule of conduct imposed by the state. Second, the defendants charged with the deprivation or violation of plaintiffs' constitutional rights must be fairly said to be state actors, because they are state officials, because they have acted together with or have obtained sufficient aid from state officials, or because their conduct is in some other way chargeable to the state. *Lugar* v. *Edmonson Oil Co., Inc., supra,* 457 U.S. at 937. Mere invocation of state legal procedures is not "joint participation" or "conspiracy" with state officials which constitutes "action under color of state law." *Id.* at 939, n.21.

The respondent attorneys here did nothing more than represent a private party in state court litigation. This Court has already determined that an attorney's successful participation in private, state court litigation does not itself render that attorney a "state actor" for purposes of §1983. In *Dennis* v. *Sparks,* 449 U.S. 24 (1980), the court held that a cause of action under §1983 was stated only where it was alleged that private attorneys had gone beyond merely representing their client and had instead conspired with and bribed a state court judge into issuing an unlawful injunction. Those private attorneys had become willful participants in joint action with the state or its agents. *Id.* at 27. However, the court made it clear that for an attorney to be a "willful participant in joint action" meant something more than simply successfully representing a client in state court litigation. The court stated:

> Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But, here, the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these

> allegations, the private parties conspiring with the judge were acting under color of state law; . . . .

Id. at 28.

Here, in contrast to *Dennis,* there are no facts alleged that support the Schulists' conclusory allegation that the defendants acted "jointly" with the state trial judge to misuse the summary judgment proceeding. Despite two amendments, the Schulists have failed to allege any facts demonstrating that the judge was implicated in a joint act with the defendants to pervert the summary judgment proceeding. There is no claim of bribery. There is no claim the state court lacked jurisdiction. There is no claim of improper influence. All the Schulists have alleged is that the judge ruled on a motion for summary judgment, as was his duty. The attorney defendants, W&H and Heiser, are alleged to have done nothing in state court other than successfully bring that motion. The Schulists claim error in granting that motion (a claim which has been rejected by the Wisconsin appellate courts), but mere error is not enough to violate §1983.

Not only do the Schulists fail to allege the requisite state action, but they also fail to properly allege any constitutional violation. Paragraph 28 of the second amended complaint sets forth three alleged violations of due process:

1. The state court exceeded or abused its authority by granting summary judgment where allegedly a disputed issue of fact existed;

2. The state court allowed W&H and Heiser to act as attorneys for Thorp, despite an alleged conflict of interest; and

3. Granting summary judgment denied plaintiffs their right to a jury trial.

The claim that the state court judge exceeded his authority by granting summary judgment is nothing more

than a claim of error in a state court proceeding. This does not state a claim cognizable under §1983, as the courts of the various circuits unanimously hold. *See, e.g., Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Bottone* v. *Lindsley,* 170 F.2d 705, 707 (10th Cir. 1948), *cert. denied,* 336 U.S. 944 (1949). The Schulists had the opportunity to appeal the alleged error to the state appellate courts of Wisconsin. The Schulists availed themselves of that opportunity. On appeal, the trial court's grant of summary judgment was affirmed. *Schulist Farms, Inc.* v. *ITT Consumer Financial Corp., et al.,* 115 Wis. 2d 695, 339 N.W.2d 366 (Wis. App. 1983), petition for review denied, 115 Wis. 2d 705 (1983). The Schulists have no right under the constitution or laws of the United States to again appeal that decision to the federal courts.

The Schulists' next allegation is that allowing W&H and Heiser to represent Thorp in the state court constituted an improper conflict of interest. Even if this were true, it amounts only to a claim of error in the state court proceeding. There is no allegation that the state court judge and the defendants conspired together to obtain the summary judgment. The failure to allege this conspiracy prevents the complaint from stating a claim under §1983. (See *Brown* v. *Chaffee,* 612 F.2d 497 (10th Cir. 1979), holding that even if attorneys had a conflict of interest, their actions were not "under color of law" and were not subject to a claim under §1983.)

Finally, the Schulists' allegation that they were wrongfully deprived of their right to a jury trial does not state a claim under §1983. The Schulists make no facial attack on the validity of the Wisconsin summary judgment statute. Rather, the Schulists' argument is based on the misconception that their due process rights in this case could only have been satisfied by a jury trial. That position is patently invalid, since due process is a flexible concept that

calls for differing procedural protections in different situations. *Mathews* v. *Elridge,* 424 U.S. 319, 333-34, 339-40, 349 (1976). In cases in which there are no issues of material fact, summary judgment is all the "hearing" that due process requires, and the grant of summary judgment does not violate a party's right to a jury trial. *Shore* v. *Park Lane Hosiery Co., Inc.,* 565 F.2d 815 (2d Cir. 1977), *aff'd,* 439 U.S. 322 (1979); *United States* v. *Arizona Fuels Corp.,* 681 F.2d 797, 799 (Temporary Emergency Court of Appeals, 1982); *Oglesby* v. *Terminal Transport Co., Inc.,* 543 F.2d 1111, 1113 (5th Cir. 1976); Wright, Miller & Kane, *Federal Practice and Procedure,* Civil 2d, §2714 (1983).

Accordingly, the Schulists' second amended complaint was properly dismissed.

II. THE PETITION DOES NOT DEMONSTRATE ANY REASON WHY THIS COURT SHOULD GRANT DISCRETIONARY REVIEW

The Schulists' petition fails to demonstrate any of the criteria set forth in Supreme Court Rule 17 governing review on certiorari.

The Schulists do not claim that the Seventh Circuit's decision conflicts with the decision of another federal court of appeals on the same matter. Indeed, the circuits are unanimous that on these facts, the activities of a private attorney in state court litigation do not constitute "state action" or "action under color of state law." *Hansen* v. *Alhgrimm,* 520 F.2d 768, 770 (7th Cir. 1975); *Harley* v. *Oliver,* 539 F.2d 1143, 1145-46 (8th Cir. 1976); *Lindley* v. *Amoco Production Co.,* 639 F.2d 671, 673 (10th Cir. 1981); *Cooper* v. *Wilson,* 309 F.2d 153 (6th Cir. 1962). Nor does the petition show that the Seventh Circuit's decision conflicts with a decision of a state court of last resort, or has so far departed from the usual course of judicial proceed-

ings (or sanctioned such a departure by a lower court) as to call for an exercise of this Court's power of supervision.

Likewise, the petition does not demonstrate that the Seventh Circuit's opinion decided any important question of federal law which has not been, but should be, settled by this Court. In fact, the opinion in *Dennis* v. *Sparks, supra,* 449 U.S. at 24, controls this case and compels dismissal of the Schulists' complaint. Thus, the petition does not and cannot demonstrate how the Seventh Circuit's decision in any way conflicts with the applicable decisions of this Court. It follows that the petition should be denied.

CONCLUSION

The Schulists have attempted to bring a state court tort action in federal court by invoking 42 U.S.C. §1983. Their complaint fails to allege facts demonstrating that they were deprived of property through state action, or that the defendants herein could be said to have acted "under color of state law" because they conducted private litigation in the state courts of Wisconsin. Accordingly, the petition for a writ of certiorari should be denied.

Dated this 14 day of September, 1984, at Milwaukee, Wisconsin.

JAMES P. BRODY
TREVOR J. WILL
Attorneys for Respondents
Whyte & Hirschboeck, S.C.,
and Edward J. Heiser, Jr.

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Office-Supreme Court, U.S.
FILED
OCT 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-281 (3)

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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21pp

QUESTION PRESENTED

Whether the United States of Appeals for the Seventh Circuit erred in affirming the dismissal of the petitioners' second amended complaint for failure to state a claim upon which relief could be granted under 42 U.S.C. sec. 1983.

STATEMENT REQUIRED BY RULE 28.1

The Respondent, ITT Consumer Financial Corporation, is a Delaware corporation. Its parent corporation is ITT Financial Corporation, also a Delaware corporation. ITT Consumer Financial Corporation has no subsidiaries. The respondent, Aetna Finance Company (Thorp Finance Corporation) is a Delaware corporation. Its parent corporation is ITT Financial Corporation, also a Delaware corporation. Aetna Finance Company (Thorp Finance Corporation) has no subsidiaries. The affiliates of the Respondents, ITT Consumer Financial Corporation and Aetna Finance Company (Thorp Finance Corporation) are ITT Small Business Finance Corporation, Aetna Finance Company, a Wyoming corporation; Aetna Industrial Loan Company; Thorp Credit Inc.; Thorp Credit Company of Kentucky; Thorp Sales Corporation; Thorp Consumer Discount Company; Thorp Loan and Thirft Company; ITT Financial Services Corporation; Newport Balboa Savings & Loan Association;

Newport Balboa Financial Corporation; ITT Financial Management Company; ITT Financial Securities, Inc.; Computer & Equipment Leasing Corporation; ITT Business Services Corporation; ITT Industrial Credit Company; ITT Industrial Credit Company of Iowa; ITT Industrial Credit Company of Tennessee; ITT Capital Resources Group, Inc.; ITT Commercial Finance Corp.; ITT Commercial Finance Limited; Lyndon Insurance Company; ITT Lyndon Life Insurance Company; ITT Lyndon Property Insurance Company; Lyndon International, Ltd.; ITT Financial N.V.; Island Finance N.V.; Island Finance (Aruba) N.V.; Island Finance (St. Maarten) N.V.; Island Finance Corporation; Island Finance Corporation of Adjuntas; Island Finance Corporation of Aguada; Island Finance Corporation of Aguadilla; Island Finance Corporation of Aibonito; Island Finance Corporation of Arecibo; Island Finance Corporation of Bayamon; Island Finance Corporation of Bayamon No. II; Island Finance Corporation of Bayamon

#3; Island Finance Corporation of Caguas; Island Finance Corporation of Caguas II; Island Finance Corporation of Caparra; Island Finance Corporation of Caroline; Island Finance Corporation of Cayey; Island Finance Corporation of Ciales; Island Finance Corporation of Cidra; Island Finance Corporation of Coamo; Island Finance Corporation of Comerio; Island Finance Corporation of Corozal; Island Finance Corporation of Dorado; Island Finance Corporation of Fajardo; Island Finance Corporation of Guayama; Island Finance Corporation of Guayanilla; Island Finance Corporation of Hato Rey; Island Finance Corporation of Juana Diaz; Island Finance Corporation of Lau Piedras; Island Finance Corporation of Levittown; Island Finance Corporation of Manati; Island Finance Corporation of Mayaguez; Island Finance Corporation of Mayaguez II; Island Finance Corporation of Naranjito; Island Finance Corporation of Ponce; Island Finance Corporation of Ponce No. II; Island Finance Corporation of Ponce No. III; Island Finance Corporation of

Puerto Nuevo; Island Finance Corporation of Rio Grande; Island Finance Corporation of Rio Piedras; Island Finance Corporation of San German; Island Finance Corporation of San Juan; Island Finance Corporation of San Juan #2; Island Finance Corporation of San Lorenzo; Island Finance Corporation of San Sebastian; Island Finance Corporation of Utuado; Island Finance Corporation of Vega Alta; Island Finance Corporation of Vega Baja; Island Finance Corporation of Yabucoa; Island Finance Corporation of Yauco.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-281

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CITATIONS TO OPINIONS AND JUDGMENTS

All relevent opinions and judgments of the Courts below have been reproduced in the Appendices of the Petitioners and the Respondents.

APPLICABLE STATUTES

Rule 12(b), Fed. R. Civ. P:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making

any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The petitioners first brought this action in the Western District of Wisconsin as a diversity case, claiming both fraud and abuse of process in obtaining a state court judgment. Respondent moved to dismiss the action for lack of subject matter jurisdiction, since all of the petitioners were Wisconsin citizens, and two of the respondents, Whyte and Hirschboeck, S.C. and Edward J. Heiser, Jr., were also Wisconsin citizens. (Motion to Dismiss Complaint, Resp. App. p. 2a) The petitioners then filed an Amended Complaint in which they attempted to establish jurisdiction by asserting a federal claim. To do so they added a one paragraph "Third Cause of Action", which did nothing more than incorporate the allegations of the two original counts and then make the conclusory allegation that the respondents "jointly and severally, acting under color of law, did wrongfully deprive the plaintiffs of their rights of property and privileges secured by

the constitution and laws under 42 U.S.C. Sec. 1983." (Amended Complaint, Pet. App. p. 12a)

The respondents moved to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction. (Motions to Dismiss, Resp. App. p. 2a) The Court granted the motions, and a judgment of dismissal was entered on February 24, 1983. (Judgment, Resp. App. p. 4a)

The petitioners then requested reconsideration of the dismissal, particularly of the claim for violation of § 1983, and the Court granted a hearing. Just before the hearing the petitioners sought leave to amend their Complaint a second time to add, as paragraph 28, an allegation that the defendants willfully acted jointly with the Circuit Court of Portage County to deprive the petitioners of property without due process of law. The alleged due process violation was obtaining summary judgment, which denied the petitioners a jury trial. (Motion to

Amend Complaint, Pet. App. p. 21a).

On March 24, 1983, after a hearing, the District Court vacated the February 24, 1983, judgment of dismissal, allowed the petitioners to amend their Complaint a second time, and then granted the respondents motions to dismiss the Second Amended Complaint. A judgment implementing that order was entered on April 8, 1983. (Judgment, Resp. App., p. 5a).

The petitioners filed an appeal in the United States Court of Appeals for the Seventh Circuit. An unpublished opinion affirming the dismissal was rendered on May 23, 1984. (Opinion, Pet. App., p. 2a). A petition for writ of certiorari was filed in the United States Supreme Court by the petitioners herein on August 15, 1984.

SUMMARY OF ARGUMENT

No special and important reasons exist for granting the petition for writ of certiorari under Rule 17.1(a) S. Ct: R. Civ. P. The Court of Appeals did not depart from the accepted and usual course of proceedings, nor did it decide an important question of federal law, in affirming the dismissal of petitioners' second amended complaint pursuant to Rule (b)(6), Fed. R. Civ. P.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THE REASON THAT IT FAILS TO SET FORTH SPECIAL AND IMPORTANT REASONS WITHIN THE PURVIEW OF RULE 17.1(a), S. Ct. R. Civ. P.

Rule 17.1(a) provides that review on a writ of certiorari is not a matter of right, but will be granted only where there are special and important reasons therefor. Jurisdiction to bringing up cases on certiorari from the federal courts of appeal was given for two purposes: first, to secure uniformity of decision between the courts of appeal and secondly, to bring up cases involving questions of great importance which it is in the public interest to have decided. The jurisdiction was not conferred merely to give the defeated party in the court of appeals another hearing. Magnum Import Co. v. De Spoturno Coty, 262 U.S. 159, 163, 75 S. Ct. 614, 99 L. Ed. 897,

924 (1955). However important a case may be to the applicant, certiorari will not be granted where the question is not one of gravity and general importance. Fields v. United States, 205 U.S. 292, 296 27 S. Ct. 543, 51 L. Ed. 807, 810 (1907).

In the instant case, petitioners allege that they lost their 1980 potato crop when a state court judge entered an order of summary judgment in favor of the respondents in a state court foreclosure proceeding. After losing in the state courts,[1] the petitioners filed their complaint in the Federal District Court alleging that respondents committed fraud and abuse of process in obtaining the state court summary judgment. The petitioners failed to set forth facts sufficient to state a claim for relief cognizable in the Federal District Court, despite being

[1]The state trial court's summary judgment was upheld by the Wisconsin Court of Appeals and a petition for review and a separate motion for reconsideration were both denied by The Wisconsin Supreme Court.

being given three opportunities to do so. The Federal District Court dismissed the petitioners' second amended complaint pursuant to Rule 12(6)(1), Fed. R. Civ. P., and the Court of Appeals affirmed in a well reasoned decision. The petitioners, having been defeated in the federal courts below, seek another hearing in this court. Certiorari is clearly not appropriate.

The petitioners attempt to convince this court that their case should be reviewed because an important question of federal law was decided when their alleged cause of action under 42 U.S.C. Sec. 1983 was rejected for failure to state a claim upon which relief could be granted.

Petitioners' interpretation of 42 U.S.C. Sec. 1983 is certainly novel. They first characterize private attorneys representing private litigants as 'state actors' on the theory that their professional conduct may be prescribed by rules of professional responsibility. They next determine that private attorneys appearing on behalf of private litigants in state court proceedings are 'acting under color of law' by

utilizing state rules of civil procedure to move for summary judgment. Finally, they conclude that the state court judge, who ruled in favor of the motion for summary judgment, is a 'co-conspirator.'

The United States Supreme Court has held that: "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. [citations omitted]. 'Special and important reasons' imply a reason to a problem beyond the academic or episodic.' Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed 897, 901 (1955).

The Court of Appeals below affirmed the application of Rule 12(b)(6), Fed. R. Civ. P. by the Federal District Court to the facts alleged in the petitioners' second amended complaint. Ordinarily, an application by a District Court of the Rules of Civil Procedure, when

affirmed by the Court of Appeals, will not be reviewed by the United States Supreme Court, particularly where the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. Appalachian Power Co. vs. American Institute of Certified Public Accountants, 80 S. Ct. 16, 4 L. Ed. 2d 30, 32 (Per Brennan, J.) (1959). The petition for writ of certiorari should be denied.

CONCLUSION

The petitioners have not shown any special and important reasons for granting their petition for writ of certiorari pursuant to Rule 17.1(a), S. Ct. R. Civ. P. The issues raised are not of public importance or interest. The Federal District Court's application of the Federal Rules of Civil Procedure to the particular facts alleged in the petitioners' second amended complaint did not constitute a grave departure from the accepted and usual course of judicial proceedings. Petitioners' novel construction of 42 U.S.C. Sec. 1983, which would effectively open the door of the federal courthouse to every defeated state court litigant, may be of academic interest, but it does not raise a substantial question of federal law. Petitioners are defeated litigants seeking a rehearing of private grievances. Their petition for writ of

certiorari should be denied as inappropriately brought under Rule 17.1(a), Sup. Ct. R. Civ. P.

Respectfully submitted this 1st day of October, 1984.

GLINSKI, HAFERMAN, ILTEN,
MILLS & DREIER, S.C.

/s/ Gary L. Dreier

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APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST AND PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., AND EDWARD J. HEISER, JR.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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4a Judgment of Feb. 24, 1983

5a Judgment of Apr. 8, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

* *

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

Plaintiffs,

-vs.-

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (THORP FINANCE CORPORATION), WHYTE AND HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT

CASE NO: 83-C-68S

* *

The defendants, ITT Consumer Financial Corporation and Aetna Finance Company (Thorp Finance Corporation), by their attorneys, Glinski, Haferman, Ilten, Mills & Dreier, S.C., by Gary L. Dreier, hereby move the Court as follows:

(1) For an Order dismissing the plaintiffs' Amended Complaint on the ground the Court lacks subject matter jurisdiction of this controversy as particularized below:

(a) The Court lacks subject matter jurisdiction under 28 U.S.C. §1331 in that instant controversy does not arise under the Constitution, laws or treaties of the United States.

(b) The Court lacks subject matter jurisdiction under 28 U.S.C. §1332 in that the instant controversy is not wholly between citizens of different states in that the defendant, Whyte and Hirschboeck, S.C., is a Wisconsin corporation organized and existing under and pursuant to the laws of the State of Wisconsin with its principal

office and place of business located in the State of Wisconsin and the defendant, Edward J. Heiser, Jr., is a citizen of the State of Wisconsin, the State of which the plaintiffs, and each of them, are also alleged to be citizens.

(c) The Court lacks subject matter jurisdiction under 28 U.S.C. §1343 in that the instant controversy does not involve the redress of any deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States, nor does the instant controversy involve any other action enumerated in said 28 U.S.C. §1343.

(2) For an Order dismissing the plaintiffs' Amended Complaint, including the first, second and third causes of action alleged therein, for failure to state a claim upon which relief can be granted.

Dated: February 18, 1983.

GLINSKI, HAFERMAN, ILTEN, MILLS & DREIER, S.C.

/s/ Gary L. Dreier

BY: GARY L. DREIER
A Member of the Firm
Attorneys for Defendants ITT Consumer Financial Corp. and Aetna Finance Company (Thorp Finance Corp.)
1025 Clark Street
Stevens Point, WI 54481
Telephone: (715) 341-3323

CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

DISTRICT NUMBER 10

FILED
FEB 24 1983
JOSEPH W. SKUPNIEWITZ, CLERK

DATE NUMBER

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

SCHULIST FARMS, INC., et al

Plaintiffs,

vs.

ITT CONSUMER FINANCIAL CORPORATION, et al

Defendants.

CIVIL ACTION FILE NO. 83-C-68

JUDGMENT

consideration
This action came on for ~~hearing~~ before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly ~~heard~~ considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion to dismiss is granted, without prejudice and with costs.

Dated at Madison, Wisconsin, this 24th day of February, 19 83.

Joseph W. Skupniewitz
Clerk of Court

Copy of this document has been provided to: Robert Wichmann
this 24th day of Feb 1983
By [illegible]
Deputy Clerk

BEST AVAILABLE COPY

CIV 32
(7/83)

JUDGMENT ON DECISION BY THE COURT

FILED 17
APR 6 1983
JOSEPH W. SKUPNIEWITZ, CLERK

United States District Court

FOR THE

WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO. 83-C-68

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

vs.

ITT CONSUMER FINANCIAL CORPORATION, AETNA FINANCE COMPANY, (Thorp Finance Corporation), WHYTE AND HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that this court's order dismissing the complaint in said matter on February 22, 1983, and that judgment entered thereon is RECONSIDERED and VACATED.

It is further ordered that plaintiffs are GRANTED their motion for leave to file second amended complaint.

It is further ordered and adjudged that defendants' motion to dismiss as it relates to plaintiffs' second amended complaint is GRANTED, with prejudice and without costs.

Dated at Madison, Wisconsin, this 6th day of April, 19 83.

JOSEPH W. SKUPNIEWITZ
Clerk of Court

By: [signature]

BEST AVAILABLE COPY